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No. 91-7604

In The
Supreme Court of the United States
October Term, 1992

JEFFREY ANTOINE,
Petitioner,

v.

BYERS & ANDERSON, INC., AND
SHANNA RUGGENBERG,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
For the Ninth Circuit

BRIEF OF RESPONDENT RUGGENBERG

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QUESTION PRESENTED

Is a federal court reporter entitled to absolute quasi-judicial immunity for acts committed within her official capacity?

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BRIEF OF RESPONDENT SHANNA RUGGENBERG

Respondent Shanna Ruggenberg asks the Court to affirm the judgment of the United States Court of Appeals for the Ninth Circuit in *Antoine v. Byers & Anderson, Inc.*, 950 F.2d 1471 (9th Cir. 1991), *cert. granted*, 121 L. Ed. 2d 240 (1992).

STATUTORY PROVISIONS

Respondent relies on the following statute and appellate rules throughout this Brief:

1. Court Reporter Act, 28 U.S.C. § 753, set forth in Appendix A.

2. Federal Rule of Appellate Procedure 10(c) set forth in Appendix B.

3. Federal Rule of Appellate Procedure 11(b) set forth in Appendix C.

RESPONSE TO PETITIONER'S STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 24.2, Respondent Ruggenberg has limited her statement of the case to information necessary to correct inaccuracies or omissions in the statement by the Petitioner.

Respondent objects to Petitioner's omission of pertinent facts which clarify Respondent's difficulties in filing a transcript for Petitioner's criminal appeal. Respondent Ruggenberg performed full-time court reporting services for the district court for the Western District of Washington from February 1986 to August 1986. *See Antoine v. Byers & Anderson, Inc.*, 950 F.2d 1471, 1472 (9th Cir. 1991), *cert. granted*, 121 L. Ed. 2d 240 (1990). Ruggenberg was required to transcribe at home in the evenings and on weekends in an attempt to satisfy the requests for overnight transcripts, excerpts of cases, verbatim reports of proceedings, and transcript requests. Unable to satisfy all of the requests, Respondent soon found herself with a backlog of work. *Id.*; JA 11.

This backlog in work led to personal financial difficulties for Respondent. JA 11. The situation culminated in Respondent's resignation from her position with Byers & Anderson on November 10, 1986. JA 11.

Respondent also objects to Petitioner's understatement of the district court's findings on remand that Petitioner suffered no specific prejudice in his criminal case arising from the delay in filing and the failure to submit a complete transcript. The district court for the Western District of Washington found that Petitioner was not prejudiced by the lack of a complete transcript. JA 45-46. Nor was the Petitioner's defense impaired by the delay in obtaining a transcript. JA 46-47. The court stated that Petitioner's

"grounds for appeal were not prejudiced by the delay." JA 46-47.

The Ninth Circuit affirmed, concluding that the district court properly determined that Petitioner suffered no impairment of his grounds for appeal due to the delay in his appeal. JA 53. The proof of guilt was overwhelming. JA 52.

SUMMARY OF ARGUMENT

The doctrine of absolute judicial immunity is well-established in our common law. However, judicial immunity protects more than the judicial acts of judges because judicial immunity is meant to protect the integrity of the entire judicial process.

Accordingly, the Court has extended absolute judicial immunity to quasi-judicial officials who perform judicial functions. *See Forrester v. White*, 484 U.S. 219 (1988). Under *Forrester's* "functional" test, the touchstone for quasi-judicial immunity is whether the function of the official is an integral part of the judicial process.

Court reporters are entitled to absolute quasi-judicial immunity because their function of creating the court record is an indispensable and integral part of the judicial process and is "inextricably intertwined with the adjudication of claims." *Antoine v. Byers & Anderson*, 950 F.2d 1471, 1476 (1991).

Petitioner's argument for a discretionary function test misinterprets the meaning of the term judicial function. An act of a quasi-judicial official need not be discretionary before immunity attaches. While discretion may be an attribute of executive immunity, it is not part of the test for judicial immunity. All acts, discretionary and non-discretionary alike,

make up the judicial function. Using labels such as "discretionary" or "ministerial" to exclude particular acts from qualifying as a judicial function is an unworkable test that will only lead to a quagmire of conflicting legal decisions.

The premise that court reporting is a judicial function is also supported by historical analysis. The sanctity of the court record lies at the very foundation of judicial immunity; it is the essence of the judicial process. The official court reporter of today is performing a function that was performed by the judge in earlier centuries. Court reporting is simply a delegation of an integral judicial function from the court to the court reporter.

In addition to satisfying the judicial function test, there are overriding public policy interests which favor absolute judicial immunity for court reporters. For example, if court reporters are not provided with absolute immunity the reporters would be exposed to extensive and vexatious liability from litigants who do not receive relief at trial. Absolute quasi-judicial immunity would prevent court reporters from having to defend against vexatious suits and would prevent any interference or interruption with court reporter and judicial functions.

In addition, many of the problems associated with the preparation of the court transcript are not caused by the court reporter. Rather, they are caused by the financial constraints of the judicial system which often leaves court reporters to face a heavy backlog of work. If civil suits were permitted against court reporters, it would be necessary to litigate the issue of courtroom backlog, further burdening the judicial system.

Absolute immunity will also ensure unbiased reporting. If court reporters are subjected to suits by disappointed

litigants, it could have a prejudicial effect on the neutral function of the court reporter. A court reporter's apprehension over subsequent damages liability might induce the court reporter to censor or alter testimony or create a deficient transcript.

Furthermore, there are ample safeguards to ensure the avoidance or correction of constitutional errors due to the mistakes or wrongs of the court reporter. For example, Federal Rule of Appellate Procedure 10(c) provides a method for restructuring the missing record. In the event that reconstruction of the record is inadequate for appellate review, the trial court's decision can be reversed and remanded for a new trial. As a further safeguard, Federal Rule of Appellate Procedure 11(b) grants a court of appeal the authority and discretion to provide relief which may be appropriate through the judicial process. These safeguards were invoked in Petitioner's case with the ultimate finding that Petitioner did not suffer any prejudice by the delay in preparing a transcript.

Finally, anything less than absolute immunity is insufficient protection for court reporters. Court reporters would have no more protection under qualified immunity than they would if court reporters were afforded no immunity at all.

ARGUMENT

I. COURT REPORTERS ARE ENTITLED TO ABSOLUTE QUASI-JUDICIAL IMMUNITY.

The doctrine of absolute judicial immunity is well-established in our common law.[1] The Court has adhered to the doctrine for more than a century following *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872), which held that a federal judge could not be held accountable in damages for a judicial act taken within that court's jurisdiction. The doctrine continues to be viable today as a method for upholding the integrity of the judicial process. *See Forrester*, 484 U.S. at 219 (affirming absolute immunity for judges performing their judicial functions).

However, judicial immunity protects more than the judicial acts of judges. The goal running throughout the Court's judicial immunity cases is to protect the entire judicial process from harassing or intimidating collateral attacks.[2] *See Forrester*, 484 U.S. at 226. To accomplish this goal, the Court has extended absolute immunity to quasi-judicial officers such as prosecutors and legal counsel. *See Burns v. Reed*, 111 S. Ct. 1934 (1991) (prosecutors absolutely immune while performing their court-related duties); *see also Imbler v. Pachtman*, 424 U.S. 409 (1976) (prosecutor enjoys same absolute immunity under 42 U.S.C. § 1983 as at common law).

Furthermore, the Court has extended absolute quasi-judicial immunity to witnesses testifying in court and jurors.

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[1] "Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction . . . ." *Pierson v. Ray*, 386 U.S. 547, 553-554 (1967).

[2] "With this judicial immunity firmly established, the Court has extended absolute immunity to certain others who perform functions closely associated with the judicial process." *Cleavinger v. Saxner*, 474 U.S. 193, 200 (1985).

See Briscoe v. LaHue, 460 U.S. 325, 328 (1983); *see also Yaselli v. Goff*, 275 U.S. 503 (1927), *aff'g* 12 F.2d 396 (2d Cir. 1926) (discussing common law precedents extending absolute immunity to judges, grand jurors, petit jurors, advocates, and witnesses).

Recently, the Court has refined a two-step approach for analyzing the issue of judicial and quasi-judicial immunity. Courts "examine the nature of the functions with which a particular official or class of officials has been lawfully entrusted" and then determine whether an exemption from liability is justified by overriding considerations of public policy. *Forrester*, 484 U.S. at 224.

Under this approach, no leap in analysis is necessary for the Court to extend absolute immunity to court reporters, whose duties are an integral part of the judicial process, *i.e.*, the adjudication of claims.[3] Accordingly, the Court should affirm the decision of the Ninth Circuit because Ms. Ruggenberg is absolutely immune from damages

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[3] The extension of absolute quasi-judicial immunity to auxiliary court personnel, including court reporters, is not a new or novel idea. There are numerous cases in the lower circuits and state courts where absolute immunity was afforded to court personnel. *See, e.g., Kincaid v. Vail*, 969 F.2d 594 (7th Cir. 1992); (absolute immunity for court clerks performing nonmechanical functions integral to judicial process); *Mullis v. U.S. Bankruptcy Court, District of Nevada*, 828 F.2d 1385 (9th Cir. 1987), *cert. denied*, 486 U.S. 1040 (1988) (absolute immunity for court clerks when performing tasks that are an integral part of the judicial process); *Sharma v. Stevas*, 790 F.2d 1486 (9th Cir. 1986) (clerk of the United States Supreme Court has absolute immunity because activities are integral to the judicial process); *Kermit Constr. Corp. v. Banco Credito Y Ahorro Ponceno*, 547 F.2d 1 (1st Cir. 1976) (receivers absolutely immune even though engaged in ministerial acts); *Lockhart v. Hoenstine*, 411 F.2d 455 (3d Cir. 1969), *cert. denied*, 396 U.S. 941 (prothonotaries absolutely immune); *Ford v. Kenosha County*, 160 Wis. 2d 485, 466 N.W.2d 646 (1991) (clerical personnel preparing a bench warrant perform a quasi-judicial act and are absolutely immune); *Stanton v. Chase*, 497 A.2d 1066 (1985) (absolute judicial immunity for bailiff performing ministerial functions).

resulting from her actions as an official court reporter for the federal district court.

A. Court Reporters Perform Judicial Functions Because Their Duties Are an Integral Part of the Judicial Process.

Under the functional approach, the Court must distinguish between the official's judicial functions and any administrative, legislative, or executive functions the official may perform. *Forrester*, at 227. Because the court reporter's tasks of recording and transcribing is an integral part of the judicial process, such tasks are not administrative, legislative or executive functions. The tasks are judicial functions subject to absolute quasi-judicial immunity.

1. A Judicial Function Encompasses More Than a Judicial Act.

Petitioner argues that the test for judicial immunity "is a judicial act that involves adjudication and discretion." Petitioner's Brief at 11. Petitioner interprets the term "judicial act," and hence the judicial function test, much too narrowly. While the judicial function test includes within its parameters "judicial acts" as defined by Petitioner, not every act of a quasi-judicial official must be adjudicative or discretionary before immunity attaches. The touchstone is whether the function the official performs is an integral part of the judicial process.[4]

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[4] The definitions of the terms "judicial" and "judicial function" in Black's Law Dictionary support equating the term "judicial function" with acts that are an integral part of the judicial process. The term "judicial" is defined as "[r]elating to or connected with the administration of justice . . . ." *Black's Law Dictionary* 846 (6th ed. 1990). Furthermore, the term "judicial function" is defined as "those modes of action which appertain to the judiciary as a department of organized government, and through and by means of which it accomplishes its purposes and exercises its peculiar powers. *Id.* at 848. A judicial function is much broader than a judicial act as defined by Petitioner.

The "judicial act" concept was derived from the jurisdictional limitation on immunity which developed from early English law. *See generally* J. Randolph Block, Stump v. Sparkman *and the History of Judicial Immunity*, 1980 Duke L.J. 879 [hereinafter Block]. Immunity for a judge was limited to "any thing done by him *as Judge*." *Id.* at 887 (citing *Floyd v. Barker*, 77 Eng. Rep. 1305, 1307 (Star Chamber 1607)) (emphasis added). This jurisdictional limitation has carried over into contemporary judicial immunity decisions which emphasize the necessity that the challenged function fall within the realm of judicial proceedings. The normal attributes of a judicial proceeding include a case or controversy, the presence of litigants, a trial or hearing, and the taking of testimony under oath. Actions outside of the arena of judicial proceedings are not entitled to immunity.

For example, in *Stump v. Sparkman*, 435 U.S. 349 (1978) the Court focused on Judge Stump's jurisdiction in approving, *ex parte*, a mother's petition for the sterilization of her daughter. The Court stated that "the factors determining whether an act by a judge is a 'judicial' one relate to the nature of the act itself, *i.e.*, whether it is a function normally performed by a judge, and to the expectations of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity." *Id.* at 362.[5]

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[5] In *Stump v. Sparkman*, the Court referenced the definition of a judicial act as articulated in *McAlester v. Brown*, 469 F.2d 1280 (5th Cir. 1972). *Stump*, 435 U.S. at 1107. The *McAlester* court listed the following four factors to consider in determining whether a judge engaged in a judicial act:

> (1) the precise act complained of . . . is a normal judicial function; (2) the events involved occurred in the judge's chambers; (3) the controversy centered around a case then pending before the judge; and (4) the confrontation arose directly and immediately out of a visit to the judge in his official capacity.

Id. at 1282.

In *Burns v. Reed*, 111 S. Ct. 1934 (1991), the Court's most recent decision on quasi-judicial immunity, the jurisdictional component of immunity was highlighted. The Court stated that an Indiana state prosecutor was absolutely immune for his conduct in a probable cause hearing before a judge. However, he was only entitled to qualified immunity for his conduct in providing legal advice to the police. *Id.* at 1940, 1943. The Court distinguished between actions that are part of the judicial process and actions that are outside the realm of purely judicial activity:

> Absolute immunity is designed to free the *judicial process* from the harassment and intimidation associated with litigation. . . . That concern therefore justifies absolute prosecutorial immunity only for actions that are connected with the prosecutor's role in judicial proceedings, not for every litigation-inducing conduct.

Id. at 1943 (citation omitted).

With regard to an official court reporter, the function of creating the court record is an indispensable and integral part of the judicial process. The official court reporter transcribes the testimony of the witnesses as well as the arguments of counsel and the rulings of the court. In essence, the court reporter acts as the ears of the court and is subject to the court's direction and control. For example, if a question or response is unclear, the court reporter may be requested to read it back to the court for clarification. A transcription of the court record may assist the court in weighing the evidence and, the transcript becomes the uncontrovertible record of the proceedings for purposes of appeal. In short, the creation of the court record "is inextricably intertwined with the adjudication of claims." *Antoine*, 950 F.2d at 1476.

2. Discretion Is Not a Necessary Element of the Judicial Function Test.

Petitioner's primary argument against affording court reporters absolute immunity is premised on an alleged lack of discretionary decision-making. According to Petitioner, "[d]iscretion is paramount." *See* Petitioner's Brief at 11.

Petitioner's argument misconstrues the parameters of the judicial function test promulgated under *Forrester*. Again, the test is whether the court reporter's function is judicial in nature, *i.e.*, whether it is part of the judicial process. Even acts that may be labelled "ministerial" or "non-discretionary" are entitled to judicial immunity if the acts support the judicial process in its adjudication of claims. *See Thompson v. Duke*, 882 F.2d 1180, 1184-85 (7th Cir. 1989), *cert. denied*, 495 U.S. 929 (1990) (all acts, whether decision-making acts or not, comprise the judicial function regardless of their isolated importance); *Foster v. Walsh*, 864 F.2d 416, 418 (6th Cir. 1988) (clerk's issuance of warrant, although non-discretionary, was a "truly judicial act" and protected by absolute immunity).

The Court's decision in *Briscoe v. LaHue*, 460 U.S. 325 (1983), exposes the fallacy of Petitioner's argument. In *Briscoe*, the Court extended absolute quasi-judicial immunity to witnesses who testify at trial and affirmed the dismissal of a damages action against a police officer who committed perjury in a criminal trial. The need to protect the integrity of the judicial process warranted immunity for witnesses who testify at trial. *Id.* at 334-335.

In *Briscoe*, the discretion of the witness was not at issue, as witnesses are not afforded discretion in their testimony. Nor was the role of the witness adjudicatory in nature. Witnesses take an oath to state the truth, and nothing but the truth. If a witness strays from the truth, the witness is subject to criminal punishment for perjury.

The purpose of providing a witness with absolute immunity is to protect the truth-finding process. The witness is relieved of the fear of subsequent liability which might influence the witness to distort their testimony. *Id.* at 333-334. As *Briscoe* teaches, the reason for judicial immunity is to protect the integrity of the judicial process, not simply to shield discretionary or adjudicatory decision-making from the chilling effects of potential damages suits.

If discretion had been the test for immunity in *Forrester*, Judge White would have been afforded absolute immunity, for a judge has discretion to hire and fire a staff within the guidelines of applicable labor laws. *C.f., Thompson v. Duke*, 882 F.2d at 1182 (discussing *Forrester's* holding that Judge White's decision to demote and discharge a probation officer was within his prerogative under Illinois law, but was not a judicial function).

3. Discretion Is a Necessary Element of Executive Immunity Not Judicial Immunity.

An inquiry into whether discretionary decision-making is part of an official's duties is only pertinent to officials in the executive branch of government, not the judicial branch. *See Westfall v. Erwin*, 484 U.S. 292 (1988); *Saul v. Larsen*, 847 F.2d 573, 575-76 (9th Cir. 1988) (test for executive branch immunity is whether the federal official's conduct was within the scope of official duties and whether the conduct was discretionary).

The body of common-law judicial immunities has developed separately and more extensively than executive or legislative immunities. While the President of the United States is afforded absolute immunity based on his "unique position in the constitutional scheme," *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982), for other executives qualified immunity is the norm. *See Harlow v. Fitzgerald*, 457 U.S. 800

(1982); *Scheuer v. Rhodes*, 416 U.S. 232 (1974). In the legislative context, the parameters of absolute immunity for legislative functions are defined by the Speech or Debate Clause, U.S. Const., Art. I, § 6, cl. 1. *See Forrester*, 484 U.S. at 224.

In contrast, the need for a completely independent judiciary has led to a solidly established and comparatively sweeping form of immunity for the judicial branch. *See Forrester*, 484 U.S. at 225;[6] *Pierson v. Ray*, 386 U.S. 547, 553-554 (1967). Petitioner's reliance on immunity decisions involving officials of the executive branch of government is therefore misplaced. Because court reporter immunity is derived from judicial and not executive immunity, discretion need not be part of a court reporter's function in order to find a court reporter immune from suit.

The most oft-cited decision for denying absolute immunity to court reporters due to an alleged lack of discretion is *McLallen v. Henderson*, 492 F.2d 1298 (8th Cir. 1974), a case also relied upon by Petitioner. In *McLallen*, the Eighth Circuit stated that a court reporter's duties were "ministerial" and non-discretionary. Therefore, court reporters were not entitled to quasi-judicial immunity from damages arising from the performance of their court reporter duties. *See McLallen*, 494 F.2d at 1299-1300.

However, following the *Forrester* decision, cases like *McLallen* and its progeny are no longer the proper basis for analyzing court reporter immunity. As the Ninth Circuit noted in *Antoine*, the *McLallen* case, which was decided before *Forrester*, "fails to consider the judicial function

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[6] "[W]e cannot pretend that we are writing on a clean slate or that we should ignore compelling reasons that may well justify broader protections for judges than for some other officials." *Forrester*, 484 U.S. at 226.

performed by the court reporter, and focuses on the discretion of the actor. We reject this approach and choose instead to focus on the nature of the function performed by the court reporter." *Antoine*, 950 F.2d at 1476, n.4.[7]

The use of labels such as "discretionary" or "ministerial" to exclude particular acts from qualifying as judicial functions creates a test that simply does not work in the judicial arena. Judges carry out ministerial or non-discretionary acts frequently during the course of judicial proceedings. This is because judges are subject to mandatory court rules and procedures, especially in the criminal arena, and the rules do not provide for discretionary decision-making. *See Thompson v. Duke*, 882 F.2d at 1184 ("In the continuum of judicial proceedings some judicial acts require extensive exercise of a judge's decision-making skills and others do not — yet all such acts make up the judicial function regardless of their isolated importance").[8] If the test for judicial immunity was

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[7] Some circuit courts continue to hold that discretion is part of the judicial function test. *See Smith v. Tandy*, 897 F.2d 355 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 177 (1990) (citing *Holt v. Dunn*, 741 F.2d 169 (8th Cir. 1984) which reaffirmed the discretionary test for judicial immunity); *Jackson v. Rowell*, 1992 U.S. Dist. LEXIS 17268 (S.D. Ala. Sept. 2, 1992) (citing *Slavin v. Curry*, 574 F.2d 1256, *modified, reh'g denied*, 583 F.2d 779 (5th Cir. 1978), which rejected absolute immunity because a court reporter's work is not discretionary). Adherence to the discretionary inquiry is the paramount reason these courts have refused to find court reporters absolutely immune. However, the courts continue to rely on cases decided before *Forrester* and fail to recognize that discretion is not the proper inquiry.

[8] In *Thompson*, the Seventh Circuit analogized to the consequences that a judicial immunity test, which attempted to draw a line between discretionary acts and "mechanical or routine" acts, would have on judges:

> If scheduling a hearing is not a part of an adjudicatory or judicial function, then an action could be maintained against a judge for

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based on the discretionary character of the act, every disappointed litigant could invoke some non-discretionary or ministerial act as the basis of a lawsuit. This would defeat the judicial immunity doctrine's purpose of protecting the judicial process from vexatious collateral attacks. *See Forrester*, 484 U.S. at 225.

There can be no bright line drawn between acts that are discretionary and acts that are not. Many judicial acts have discretionary and non-discretionary attributes. To break down each individual act committed in the course of the judicial process and analyze that act for attributes of discretion will only lead to a quagmire of conflicting legal decisions.[9]

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> injuries to an incarcerated defendant resulting from the judge's alleged failure to schedule a hearing or trial within an applicable speedy trial limitations period, or the judge's alleged failure to conduct a hearing or trial on the date scheduled. By the same token, if the judge purportedly failed to properly execute his duty to advise a criminal defendant of certain statutory or criminal rights, yet accepted a guilty plea and incarcerated the defendant, under Thompson's rationale an action could be maintained against the judge for damages liability if the defendant is injured while in custody awaiting the outcome of his challenge to the court's methodology.

Thompson, 882 F.2d at 1185.

[9] The Seventh Circuit's analysis in *Thompson* is instructive. A prisoner brought an action against various parole board officials alleging that their failure to schedule and conduct a timely parole violation hearing constituted deprivation of his constitutional rights. Thompson claimed that these "administrative" acts were not entitled to quasi-judicial immunity. *Thompson*, 882 F.2d at 1183. In affirming the grant of absolute immunity to the parole board officers, the Seventh Circuit stated that the duty to schedule and conduct a parole violation hearing, "while perhaps routine in many cases, is obviously an integral judicial (or quasi-judicial) function subject to absolute immunity." *Id.* at 1184. The court also noted that judicial officers would be subjected to "unlimited litigation" if the test of immunity focused on the whether a judicial act was "mechanical or routine." *Id.* at 1184-85.

A workable definition for judicial immunity is created when the focus of the inquiry is on the function the act serves. This also properly protects the integrity of the judicial process. Thus, all auxiliary judicial personnel whose acts are integral to the judicial process are then clothed with judicial immunity regardless of the discretionary or non-discretionary character of their acts.

This argument in no way concedes that Respondent Ruggenberg's conduct as a court reporter was devoid of discretionary attributes. The framework in which court reporters function allows them to exercise discretion in fulfilling their responsibilities to the court and to litigants. In terms of the reporting function itself, a court reporter uses discretion in taking testimony. A transcript is by no means a perfect record of the trial, and a court reporter must frequently interpret gestures by the witness such as affirmative nods of the head, or clean up the transcript by removing meaningless exclamations by the court or counsel such as "uhm," "you know," and the like.

The court reporter also exercises discretion in the transcription of the record itself. For example, in this case the record reflects that Ruggenberg had a heavy backlog of requests for transcripts. JA 52. The manner and order in which she dealt with this backlog was within her discretion.[10]

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[10] Petitioner's argument that the statutory 30-day time limit for preparing transcripts deprived Ruggenberg of any discretion in the matter ignores the reality of the situation. Court reporters are routinely given extensions of time as evidenced by several extensions granted to Ruggenberg in this case. JA 53. The courts recognize that the overburdened judicial system makes strict compliance with such rules nearly impossible.

4. Historical Analysis Supports Respondent's Argument That a Court Reporter's Function Is Judicial.

In determining whether immunity should extend to a certain class of officials, the Court has frequently conducted a historical inquiry, analyzing both early American and English decisions to determine if the common law provided such immunity. *See, e.g., Burns v. Reed*, 111 S. Ct. 1934 (1991); *Briscoe v. LaHue*, 460 U.S. 325 (1983); *see also* Block, at 879.

Petitioner argues that court reporters are not entitled to immunity because there is no historical or common law recognition of court reporter immunity. *See* Petitioner's Brief at 27. Petitioner's argument is fundamentally flawed. While court reporting did not become a common practice until the twentieth century, *see* Oswald M.T. Ratcliffe, *Verbatim Reporting Comes of Age*, 56 Judicature 368, 368-370 (1973), the function of making a record of the court proceeding dates back to the earliest English law. Jay M. Feinman & Roy S. Cohen, *Suing Judges: History and Theory*, 31 S.C. L. Rev. 201, 207 (1980) [hereinafter Feinman & Cohen].

The importance of the court record lies at the very foundation of judicial immunity. In early English law the doctrine of sanctity of records evolved which prevented the time consuming challenges to the findings of fact by the king's court. *See* Block, at 883. Under the doctrine of sanctity of records, the record of the court was considered the final word, superior to all other records.[11] The doctrine was first applied in the court in which the king sat in person,

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[11] The record of the king's court was originally written in Latin on rolls of parchment. *See* Block, at 883.

and this privilege was extended to all the king's courts as they expanded. *Id.* The doctrine of sanctity of records thus lent a degree of finality to judgments by eliminating attacks on the record. *See* Block, at 884; *see also* Feinman & Cohen, at 206 ("Since the record of the court was incontrovertible, no party could allege that an act noted therein was wrong, and thus the source of the record — the judge — could not be subject to civil and criminal liability for an abuse of power.").[12]

The sanctity of records doctrine in turn led to a system of appeal of the court's legal conclusions to a higher court of law. *See* Block, at 883. In order for the appeal system to be authoritative, however, collateral attacks in the nature of actions against judges needed to be eliminated. The doctrine of judicial immunity therefore developed to eliminate these collateral attacks on the record. *See* Block, at 885.

This English form of judicial immunity, with its purposes of discouraging collateral attacks on the record and

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[12] The historical importance of the doctrine of sanctity of records in creating judicial immunity is emphasized in a case reported in one of the books of Assizes:

> J de R was arraigned for that, whereas he was a justice to hear and terminate felonies and trespasses, and whereas certain persons were indicted for trespass, he made entry in his record that they were indicted for felony. And judgment was demanded for him [for all that he did] from the time that he was justice by commission, and that which he [the accuser] presents will be to undo his record, which cannot be by law if to such presentment the law puts him to answer. And it was the opinion of the justices that the presentment was bad.
>
> The only recourse open to the suitor in such a case was to attack the [legal conclusions in the] record by writ of error, founded either on the record or on a bill of exceptions to a ruling of the judge.

6 W. Holdsworth, *A History of English Law* 235-36 (2d ed. 1937).

creating an appellate system of review, was adopted by the American courts. In *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1872), the Court found that judicial immunity was "the settled doctrine of the English courts for many centuries, and has never been denied, that we are aware of, in the courts of this country."

The official record is the essence of the judicial process. It reflects the evidence taken in the case and the decision of the court. As the history of judicial immunity reveals, an attack on the maker of the record is an attack on the judicial process itself.[13] The court reporter is acting as an arm of the judge in taking the testimony of the trial, and is entitled to judicial immunity for performing this integral function.

Moreover, the official court reporter of today is performing a function that was performed by the judge in earlier centuries. Although appellate review in earlier years differs greatly from current appellate review, judge's notes were sometimes used as the court record up until the twentieth century. *See* John H. Langbein, *Shaping the Eighteenth Century Criminal Trial: A View from the Ryder Sources*, 50 U. Chi. L. Rev. 1, 19 (1983). For example, in English capital cases, trial judges were consulted in response to a petition for clemency, and the trial judges would invariably rely on their trial notes to frame their replies. *Id.* Judges were also known to enter remarks directed at post-verdict proceedings. *Id.* at 20. All such actions were entitled to judicial immunity.

While this method for reporting trial proceedings and recording evidence may differ vastly from today's verbatim

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[13] "Impugning the integrity of the record verged on impugning the integrity of the monarch." Feinman & Cohen, at 207.

recording of proceedings, it is uncontroverted that judicial immunity attached to the court record and judge's notes of the proceedings.

It is irrelevant that court reporters were unknown in early common law and, therefore, not involved in the recording function. Historically, the source of the court record was the judge, and it is from the court record that immunity emerged. Accordingly, the current source of the court record, the official court reporter, is entitled to absolute immunity for this task, for "immunity is justified and defined by the *functions* it protects and serves, not by the person to whom it attaches." *Forrester v. White*, 484 U.S. 219, 227 (1988).

B. Public Policy Considerations Support Judicial Immunity for Court Reporters.

In addition to viewing court reporting as a judicial function, there are overriding public policy interests which favor absolute judicial immunity for court reporters. As discussed below, absolute immunity for court reporters serves the interests of the administration of justice without affecting substantial rights of litigants.

1. Excluding Auxiliary Court Personnel From the Protections of Absolute Judicial Immunity Places Court Reporters at Undue Risk for Lawsuits by Disappointed Litigants.

It is well established that litigants are precluded from suing judges for actions arising from the performance of their judicial functions. *Forrester v. White*, 484 U.S. 219, 224 (1988). However, when dealing with the application of the judicial immunity doctrine to auxiliary judicial personnel, there is the strong "danger that disappointed litigants, blocked by the doctrine of absolute immunity from suing the judge directly, will vent their wrath on clerks, court reporters, and other judicial adjuncts . . . ." *Kincaid v. Vail*, 969 F.2d 594, 601

(7th Cir. 1992) (*quoting Scruggs v. Moellering*, 870 F.2d 376 (7th Cir.), *cert. denied*, 493 U.S. 956 (1989)). The disappointed litigant would be undeterred by the dismissal of the judge from the lawsuit on the basis of immunity. The lawsuit would likely continue against any remaining targets such as the court reporters and other auxiliary judicial personnel.

A typical example of the disappointed litigant scenario arises when a litigant alleges a conspiracy between the judge and the quasi-judicial staff, including court reporters. *Scruggs*, 870 F.2d at 377. It would be anomalous to permit the judge to be dismissed in the typical conspiracy charge case, but require all other quasi-judicial staff to continue to defend against the suit. It is unfair to "spare the judges who give orders while punishing the officers who obey them." *Valdez v. City of Denver*, 878 F.2d 1285, 1289 (10th Cir. 1989).

Moreover, court reporters would be exposed to extensive liability if they are not protected from litigants who do not receive relief at trial. This exposure to potential multi-million dollar lawsuits would be enough to dissuade even the most competent court reporter from accepting courtroom employment, and this would have a detrimental effect on an already overburdened judicial system.

Petitioner nevertheless argues that immunity should not be given to court reporters for the express dereliction of their duties. Petitioner's Brief at 26. If Petitioner's argument were extended to its logical conclusion, it would give rise to a potential cause of action in every case where the statutory 30-day deadline for preparing a transcript was not met. *See* Court Reporter Act, 28 U.S.C. § 753, set forth in Appendix A.

Court reporters often face a heavy backlog of work in many jurisdictions, as evidenced by the facts in this case and by the facts in *Rheuark v. Shaw*, 628 F.2d 297 (5th Cir. 1980),

cert. denied, 450 U.S. 931 (1981). The financial constraints on the judicial system which preclude courts from employing additional reporters are generally responsible for the backlog. *Id.* at 301. If civil suits were permitted against court reporters it would be necessary to litigate the issue of courtroom backlog. This would require an intensive factual inquiry into the courtroom functions and procedures. At the very least, the inquiry would be disruptive to the judicial process. At the very worst, the inquiry would aggravate the problems of judicial backlog and delay.

2. Providing Court Reporters With Absolute Immunity Protects the Judicial Process From Vexatious Litigation.

"Absolute immunity is designed to free the *judicial process* from the harassment and intimidation associated with litigation." *Burns v. Reed*, 111 S. Ct. 1934, 1943 (1991). Vexatious lawsuits interfere with the duties of judges and quasi-judicial officials alike. *See id.*; *Kincaid v. Vail*, 969 F.2d 594 (7th Cir. 1992). Consequently, the Court has recognized that there is a broader policy underlying judicial immunity than simply protecting judges from vexatious litigation. Because court reporters are an integral part of the judicial process, the policy for immunity extends to them as well. *Kincaid*, 969 F.2d at 601.

As the Court noted in *Briscoe v. LaHue*, 460 U.S. 325 (1983), a case that goes to trial always imposes significant emotional and financial costs, amongst other things, on every party litigant; even the processing of a complaint that is dismissed before trial consumes a considerable amount of time and resources. *Id.* at 343-344.

These effects on the court reporter and the court system demonstrate that the greater public good is served by

preventing all suits against court reporters. Absolute quasi-judicial immunity would prevent court reporters from having to defend against vexatious suits and would prevent any interference or interruption with court reporter functions.

3. Fear of Litigation Could Have an Untoward Effect on the Court Reporter's Duties.

Subjecting court reporters to suit by disappointed litigants could have an untoward effect on the neutral function of the court reporter. A court reporter's apprehension of subsequent damages liability might induce the reporter to censor or alter testimony in a manner that would favor the feared litigant, and the simple act of changing a "yes" to a "no" could have a decisive effect on the outcome of an appeal. A court reporter may even create a deficient transcript for the purposes of providing the feared litigant with the opportunity to have a verdict vacated and remanded as happened in Petitioner's underlying criminal action. Such results would severely undermine the integrity of the judicial process.

4. There Are Court Rules and Judicial Mechanisms Which Can Be Used to Prevent Court Reporters From Abusing Their Authority and Taking Advantage of Immunity.

Crucial to the public policy analysis is the ability to correct mistakes or wrongs "through ordinary mechanisms of review." *Forrester v. White*, 484 U.S. 219, 227.[14] As shown

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[14] As stated by Justice Powell in his dissent in *Stump v. Sparkman*, 435 U.S. 349, 370 (1980):

> Underlying the *Bradley* immunity, then, is the notion that private rights can be sacrificed in some degree to the achievement of the greater public good deriving from a completely independent judiciary, because there exist alternative forums and methods for vindicating those rights.

by the history of this case, there are ample safeguards to ensure the avoidance or correction of constitutional errors due to the mistakes or wrongs of the court reporter.

To begin with, the federal rules specifically contemplate situations where no transcript is available, and the rules provide a method for restructuring the missing record. *See* Federal Rule of Appellate Procedure 10(c) set forth in Appendix B. This alternative method is permissible if it provides the appellate court with an "equivalent report of the events at trial from which the appellant's contentions arise." *United States v. Smaldone*, 583 F.2d 1129, 1134 (10th Cir. 1978).

In the event that reconstruction of the record is inadequate for appellate review, the trial court's decision can be reversed and remanded for a new trial. *See, e.g., United States v. Anzalone*, 886 F.2d 229, 232 (9th Cir. 1989); *United States v. Piascik*, 559 F.2d 545, 547 (9th Cir. 1977), *cert. denied*, 434 U.S. 1062 (1978). In Petitioner's underlying criminal action, the Ninth Circuit vacated Petitioner's conviction and remanded the case back to the trial court for determination of whether Petitioner suffered any specific prejudice for the lack of a complete transcript. *See United States v. Antoine*, 906 F.2d 1379 (9th Cir.), *cert. denied*, 111 S. Ct. 398 (1990). The trial court specifically found that Petitioner had not suffered any prejudice by the lack of a complete and timely appellate record. JA 45. This decision was then subject to further appellate review and affirmed by the Ninth Circuit in an unpublished opinion. JA 66.

As a further safeguard, Federal Rule of Appellate Procedure 11(b) gives a Court of Appeals the authority and discretion to provide relief which may be appropriate through the judicial process. *See* Federal Rule of Appellate Procedure 11(b), set forth in Appendix C. Specifically, the court can

find a court reporter in contempt and impose fines and or jail time to the offending party. The Ninth Circuit found it necessary to impose both penalties in this case. JA 24.

Consequently, court rules and judicial mechanisms protect the court system and litigants from any abuses that may arise under a system of absolute quasi-judicial immunity for court reporters. There would be no recurring harm to individual citizens if court reporters were absolutely immune from suit.

II. QUALIFIED JUDICIAL IMMUNITY DOES NOT ADEQUATELY PROTECT THE INTERESTS OF COURT REPORTERS.

Petitioner incorrectly argues that qualified immunity adequately protects the interests of court reporters. Petitioner's Brief at 31-34. There is a significant procedural difference between absolute and qualified immunity. "An absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity. The fate of an official with qualified immunity depends upon the circumstances and motivations of his actions, as established by the evidence at trial." *Imbler v. Pachtman*, 424 U.S. 409, 419 n.13.

Consequently, if court reporters are protected by absolute judicial immunity, any lawsuit brought against them can be defeated with a motion to dismiss for failure to state a claim upon which relief may be granted. However, if court reporters are only protected by qualified judicial immunity, they must plead the immunity as an affirmative defense and establish the defense through evidence either on a motion for summary judgment or at trial. *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982). The defense is defeated if there is

objective evidence showing that court reporters violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818.

The difference between absolute and qualified immunity is significant and very important for court reporters. Because of the heavy work backlog many court reporters face discussed above, court reporters are often unable to comply with the 30 day statutory deadline for filing a transcript with the court of appeals. *See* Federal Rule of Appellate Procedure 11(b) set forth in Appendix C. The problem created by work backlogs provides many potential opportunities for a plaintiff to establish that a court reporter violated a clearly established statutory right. Furthermore, although the court reporter can file an extension of time to complete the transcript under Fed. R. App. P. 11(b), repeated requests will ultimately result in a due process claim against the court reporter.

Thus, contrary to Petitioner's argument, it would not only be those court reporters who willfully shirk their statutory duties who would be left unprotected by some form of immunity. Petitioner's Brief at 34. Qualified immunity for a court reporter would be unavailable as a defense at the outset for many court reporters who are overburdened by the legal system. Court reporters would have no more protection under qualified immunity than they would if court reporters were afforded no immunity at all. The Ninth Circuit did not err in rejecting qualified immunity as the standard for court reporters.

CONCLUSION

For the reasons set forth in this Brief, Respondent Ruggenberg respectfully requests that the Court affirm the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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APPENDIX A

28 U.S.C. § 753(b).

Each session of the court and every other proceeding designated by rule or order of the court or by one of the judges shall be recorded verbatim by shorthand, mechanical means, electronic sound recording, or any other method, subject to regulations promulgated by the Judicial Conference and subject to the discretion and approval of the judge. The regulations promulgated pursuant to the preceding sentence shall prescribe the types of electronic sound recordings or other means which may be used. Proceedings to be recorded under this section include (1) all proceedings in criminal cases had in open court; (2) all proceedings in other cases had in open court unless the parties with the approval of the judge shall agree specifically to the contrary; and (3) such other proceedings as a judge of the court may direct or as may be required by rule or order of court as may be requested by any party to the proceeding.

The reporter or other individual designated to produce the record shall attach his official certificate to the original shorthand notes or other original records so taken and promptly file them with the clerk who shall preserve them in the public records of the court for not less than ten years.

The reporter or other individual designated to produce the record shall transcribe and certify such parts of the record of proceedings as may be required by any rule or order of court, including all arraignments, pleas, and proceedings in connection with the imposition of sentence in criminal cases unless they have been recorded by electronic

sound recording as provided in this subsection and the original records so taken have been certified by him and filed with the clerk as provided in this subsection. He shall also transcribe and certify such other parts of the record of proceedings as may be required by rule or order of court. Upon the request of any party to any proceeding which has been so recorded who has agreed to pay the fee therefor, or of a judge of the court, the reporter or other individual designated to produce the record shall promptly transcribe the original records of the requested parts of the proceedings and attach to the transcript his official certificate, and deliver the same to the party or judge making the request.

The reporter or other designated individual shall promptly deliver to the clerk for the records of the court a certified copy of any transcript so made.

The transcript in any case certified by the reporter or other individual designated to produce the record shall be deemed prima facie a correct statement of the testimony taken and proceedings had. No transcripts of the proceedings of the court shall be considered as official except those made from the records certified by the reporter or other individual designated to produce the record.

The original notes or other original records and the copy of the transcript in the office of the clerk shall be open during office hours to inspection by any person without charge.

APPENDIX B

FRAP (10)(c).

(c) **Statement on the Evidence or Proceedings When No Report Was Made or When the Transcript Is Unavailable.** If no report of the evidence of proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement shall be served on the appellee, who may serve objections or proposed amendments thereto within 10 days after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the district court for settlement and approval and as settled and approved shall be included by the clerk of the district court in the record on appeal.

APPENDIX C

FRAP 11(b).

(b) **Duty of Reporter to Prepare and File Transcript; Notice to Court of Appeals; Duty of Clerk to Transmit the Record.** Upon receipt of an order for a transcript, the reporter shall acknowledge at the foot of the order the fact that the reporter has received it and the date on which the reporter expects to have the transcript completed and shall transmit the order, so endorsed, to the clerk of the court of appeals. If the transcript cannot be completed within 30 days of receipt of the order the reporter shall request an extension of time from the clerk of the court of appeals and the action of the clerk of the court of appeals shall be entered on the docket and the parties notified. In the event of the failure of the reporter to file the transcript within the time allowed, the clerk of the court of appeals shall notify the district judge and take such other steps as may be directed by the court of appeals. Upon completion of the transcript the reporter shall file it with the clerk of the district court and shall notify the clerk of the court of appeals that the reporter has done so.

When the record is complete for purposes of the appeal, the clerk of the district court shall transmit it forthwith to the clerk of the court of appeals. The clerk of the district court shall number the documents comprising the records and shall transmit with the record a list of documents correspondingly numbered and identified with reasonable definiteness. Documents of unusual bulk or weight, physical

exhibits other than documents, and such other parts of the record as the court of appeals may designate by local rule, shall not be transmitted by the clerk unless the clerk is directed to do so by a party or by the clerk of the court of appeals. A party must make advance arrangements with the clerks for the transportation and receipt of exhibits of unusual bulk or weight.